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Nos. 96-790 and 96-635

In the Supreme Court of United States
October Term, 1996

Probation Association of New Jersey, Petitioner,
v.
Deborah T. Poritz, et al., Respondents.

Robert F. Kirchgessner, et al., Petitioners,
v.
Robert N. Wilentz, et al., Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION

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28 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Pickering v. Board of Education, 391 U.S. 563 (1968), which calls for the balancing of a public employer's interest in efficient operations against public employees' interests in commenting on issues of public concern in determining the constitutionality of public workplace limitations on speech, applies to restrictions on public employees' expressive associations, or whether such restrictions should be reviewed in accordance with case law applicable to political patronage.

2. Whether the lower courts properly applied the balancing test found in Pickering v. Board of Education, in finding that the New Jersey Supreme Court's interests in maintaining the impartiality of the state's judiciary outweighed the interest of the judiciary's probation officers in affiliating with law enforcement organizations.

3. Whether petitioners stated claims that liberty or property interests were taken without due process of law.

4. Whether a federal court claim against justices of a state supreme court, in their official capacities, is barred by the Eleventh Amendment to the United States Constitution.

5. Whether the district court abused its discretion in declining to exercise supplemental jurisdiction over purely state law claims involving novel issues regarding the relationship between the state's judiciary and its employees, where all federal claims had been dismissed.

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Respondents' Consolidated Brief In Opposition to Petitions for A Writ Of Certiorari

COUNTERSTATEMENT OF OPINIONS BELOW

The Petitions filed in this matter fail to note that the district court's opinion is reported. Kirchgessner v. Wilentz, 884 F. Supp. 901, 149 L.R.R.M. (BNA) 2718 (D.N.J. 1995). The decision of the United States Court of Appeals for the Third Circuit is referenced in a "Table of Decisions Without Reported Opinions." Kirchgessner v. Wilentz, 92 F.2d 171 (1996).

COUNTERSTATEMENT OF THE CASE

I. INTRODUCTION.

The central issue in this case is whether the supreme court of a state, in order to ensure the impartiality of the state's judiciary, in appearance and in fact, may impose reasonable restrictions on job-related associations of employees of the judiciary. The district court, finding that the "vital importance" of "maintaining impartiality both in appearance and in fact" is of greater concern for the judiciary than for other branches of government (P. App. 29-31)[1] upheld associational restrictions imposed by the New Jersey Supreme Court. In doing so, the district court did nothing more than apply the same balancing test, the one found in Pickering v. Board of Education, 391 U.S. 563 (1968), as has been applied by every circuit of the United States Court of Appeals that has had occasion to decide what test should be used in determining the constitutionality of restrictions on public employees' expressive associations.

The complaints in this matter challenged the right of the State of New Jersey's Supreme Court, which reaffirmed a longstanding policy that probation services are an "integral part" of the judiciary, to prohibit the alignment of probation officers with organizations which publicly pronounce themselves to be "law enforcement organizations." The New Jersey Supreme Court decided that its approximately 1,500 probation officers may not affiliate themselves with police organizations because the police, in public appearance and in fact, are inextricably linked in the criminal justice system to the prosecutorial side of the adversary process.

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[1] All references to P. App. are references to the appendix to the Petition of the Probation Association of New Jersey.

Under the New Jersey constitutional scheme, the New Jersey Supreme Court exercises plenary authority over all aspects of the administration of the Judicial Branch of State government. The New Jersey Supreme Court, in promulgating the policy challenged here, acted in a quasi-legislative capacity. Its review was conducted in the context of an expressed interest by the Probation Association of New Jersey ("PANJ"), the representative of all probation officers, to affiliate with a police organization. PANJ has been recognized as the exclusive bargaining representative of probation officers. The right of probation officers to unionize is not at issue in this case, only their right to select a union identified as a law enforcement organization.

The New Jersey Supreme Court reviewed the different functions of probation officers and police officers, made judgments regarding the impacts that membership in law enforcement organizations would have on the appearance of impartiality of the judiciary and considered, in a common sense fashion, how such membership would affect that impartiality in fact. While petitioners might disagree with the policy judgments made by the New Jersey Supreme Court, the underlying reasonableness of those judgments is unassailable and outweighs probation officers' interest in joining law enforcement organizations.

II. PROCEDURAL AND FACTUAL BACKGROUND

In these two consolidated actions, petitioners, seven named probation officers in one complaint (the Kirchgessner Complaint) and an independent union, the Probation Association of New Jersey representing probation officers, in the other complaint (the PANJ Complaint), filed an action in the United States District Court for the District of New Jersey and sought an injunction enjoining the New Jersey Supreme Court's policy prohibiting probation officer membership in police organizations.

The central claim of petitioners was that the New Jersey Supreme Court's restriction on membership in police organizations was a violation of petitioners' associational rights. The Kirchgessner Complaint also alleged certain self-styled due process violations and both complaints alleged state law violations arising out of New Jersey constitutional and statutory provisions regarding public employees organizational rights. Neither complaint contained a claim that these state constitutional or statutory rights created property or liberty interests which were the basis for a due process claim. (P. App. 18a, 19a, 35a).

Respondents moved to dismiss the Complaint pursuant to Fed.R.Civ.P. 12(b)(6) on the grounds, among others, that, given the State's paramount interest in maintaining an independent and impartial judiciary, the prohibition of probation officer membership in police organizations is of the type that a public employer may reasonably place on its employees. With respect to the state law claims, defendants argued that supplemental jurisdiction should not be exercised, that the district court's jurisdiction over state law claims was barred by the Eleventh Amendment of the United States Constitution and, finally, in any case, petitioners' allegations did not constitute a violation of New Jersey constitutional or statutory law.

The district court granted respondents' cross-motion to dismiss and denied petitioners' motions for a preliminary injunction and class certification as moot. Addressing the central issue in the case, the district court stated:

> The Chief Justice and the Associate Justices made a reasonable determination that membership by probation officers in the State PBA and the FOP will impair the impartiality of the judiciary in fact and appearance. It appears this harm is "real" and "not merely conjectural." National Treasury, 115 S.Ct. at 1017. Further, the interest in maintaining the

> appearance of impartiality of the judiciary outweighs the desire of the Plaintiffs to affiliate with law enforcement organizations.

(P. App. 32a-33a). The court found that, "beyond doubt," the remaining federal claims lacked merit (P. App. 36a-40a). Finally, the court exercised its discretion and declined to exercise supplemental jurisdiction over the state law claims (P. App. 40a-42a). Hence, the federal claims were dismissed with prejudice and the state law claims were dismissed without prejudice. The district court's Order was affirmed without opinion on July 19, 1996 by the United States Court of Appeals for the Third Circuit. (P. App. 1a).

The present controversy arose when the New Jersey Supreme Court was asked to revise its longstanding policy prohibiting probation officer membership in police organizations. In order to review the matter, the Court asked a Special Master to address certain issues regarding the impacts of probation officer membership in law enforcement organizations. (P. App. 53a). While generally finding that membership in the FOP and PBA will not have an impact upon the function of probation if the individual probation officers are ethical professionals with integrity, the Special Master's opinion acknowledged that a "true factual determination" could not be made (P. App. 58a), that ultimately the issues turn on one's view of "human nature," (P. App. 60a-63a) and that it is not possible to provide a generalized answer that would be applicable to all probation officers (P. App. 67a).

After reviewing the Special Master's report, the New Jersey Supreme Court issued a decision reaffirming its longstanding policy prohibiting probation officers from membership in law enforcement organizations (P. App. 88a-124a). That decision turned on "the nature of judicial integrity and its essential quality of impartiality" (P. App. 90a), the inclusion of probation within the judiciary, and the

role of law enforcement as one of the adversaries that appears before the judiciary.

In reviewing the issue of probation officer affiliation with police organizations, the New Jersey Supreme Court discussed the basic function of probation, the policy which requires a separation of the probation function from law enforcement and the impact on the probation function, both in appearance and fact, of probation officer membership in police organizations. While the roles of probation officers, as employees of the judiciary, have some similarity to roles of executive branch parole officers, there are also substantial differences.

Historically, the primary function of probation has been the enforcement of court orders, including the conditions of probation. It also includes, in appropriate circumstances, the presentation of probation violation reports to judges. This central function includes both punitive and rehabilitative components which must be balanced by the probation officer (P. App. 93a-95a, 99a, 100a). More recently, other critical functions have been added to the responsibilities of probation officers such as case management functions (P. App. 109a) including investigating for and preparing pre-sentence reports, bail reports and pretrial intervention reports, all of which are used by judges in making judicial decisions (P. App. 112a, 113a). In addition to discussing probation as it currently functions, the Court also stated that the future of probation is likely to include increasing efforts at rehabilitation. (P. App. 101a-108a).

Considering those functions, the New Jersey Supreme Court determined that it is absolutely critical that probation officers function at arms length from police and police organizations. As the Court stated:

> Probation is an integral part of the judiciary; everything that probation does it does as an arm of

> the judiciary. Among other things, it is the entity that enforces judicial orders. Given the nature and functions of probation, it must be as impartial as the rest of the judiciary, totally so and scrupulously so. Probation cannot take sides any more than a court may. It is not pro-this or anti-that, it is not on the side of either men and fathers or women and mothers, it is not on the side of either prosecutors or defendants. It has no more right to become allied with a public defender's office than with prosecutors or police. Probation represents no special interest in society and government but one: the courts.
>
> Police and police organizations have but one interest and one role: law enforcement. Everything they do serves that interest: investigating crime, apprehending criminals, aiding in the prosecution and conviction of the accused, and in the imposition of punishment. The police stand firmly and properly on one side of the scales of criminal justice -- the prosecution's side.
>
> Put simply, the functions of police and probation -- one serving the prosection the other serving the courts -- are not only different, but incompatible. Separation of the two is essential to the impartiality of the probation function and to the integrity of the judiciary. [P. App. 90a-91a]

Exercising its quasi-legislative role, the New Jersey Supreme Court recognized that the effects with which it was concerned were not subject to empirical verification given the highly discretionary nature of the probation officers work and the fact that the impacts of a group affiliation may be "conscious or subconscious," (P. App. 113a), "subtle" (P. App. 116a) and "almost impossible to monitor" (P. App. 117a, 95a). The Court also expressed concern with the impact of public identification of probation officers with the

police function. Specifically, the Court noted that the identification of probation officers as "law enforcers" or "police" would affect the willingness of community groups, families and probationers to work with probation officers (P. App. 103a-106a).

The New Jersey Supreme Court also noted that the mere fact that probation officers are choosing to align themselves with police organizations provides a factual basis for its concerns.

> Certainly, the strength of the movement of probation officers to associate with police, whether in the FOP or in the PBA, is testimony to the conclusion that the risks of identity and influence is more than minimal. ...
>
> Why the Fraternal Order of Police? Why not Rotary, Kiwanis, Knights of Columbus, or hundreds of other social or fraternal organizations, even some with activist agendas? It is the police function that attracts, it is the identification by the probation officers themselves with the police and vice versa. It is the striking manifestation, no matter how benign, of precisely what this Court is trying to avoid, to prevent, and to eliminate. [P. App. 116a, 121a].

ARGUMENT

A.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PRECEDENTS OF THIS COURT REQUIRING THE APPLICATION OF A BALANCING TEST TO LIMITATIONS PLACED ON PUBLIC EMPLOYEES' ASSOCIATIONAL RIGHTS WERE CORRECTLY APPLIED BELOW.

Petitioners' argument that Elrod v. Burns, 427 U.S. 347 (1976) and its progeny require the application of "strict scrutiny" to any limitations on the expressive associations of public employees is fatally flawed in two respects. First, these cases have been limited to situations involving political patronage and have not been given broader application to all forms of association. Second, even for political patronage cases, this Court has not applied "strict scrutiny." O'Hare Truck Service, Inc. v. City of Northlake, ___ U.S. ___ 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996); Branti v. Finkel, 445 U.S. 507 (1980); Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990). Although the introductory discussion in the plurality decision in Elrod does suggest the application of "exacting scrutiny," 427 U.S. at 362, to a patronage dismissal of a public employee, as the district court recognized (P. App. 24a), the Elrod case has come to stand for a narrow test to be applied where political patronage is used as a consideration in public employment and contracting decisions. See O'Hare Truck Service, 116 S.Ct. at 2357; Branti, 445 U.S. at 518 and Rutan, 497 U.S. at 74. That test is based on whether party affiliation is an appropriate requirement for performance of the public official or the contract involved. Often that analysis will turn on whether the position is "policymaking" or "confidential." Branti, 445 U.S. at 518. Moreover, while party affiliation is a form of association, there is nothing in

the Elrod line of cases to suggest that the Elrod test is to be applied to other forms of association.

While this Court long ago abandoned Justice Holmes' view that public employment may be conditioned on the relinquishment of First Amendment rights,[2] Keyishian v. Board of Regents, 385 U.S. 589 (1967), it is equally well established "that the State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general,'" Connick v. Meyers, 461 U.S. 138, 140 (1983), citing Pickering v. Board of Education, 391 U.S. 563, 568, (1968). Similarly, the State's interest in regulating the associations of its employees, particularly those associations with a workplace nexus, differ significantly from its interests in regulating the associations of the citizenry in general.

Recognizing the significance of the State's interest in managing its workforce, this Court has not applied a "strict scrutiny" test to government restrictions on the speech and associations of its employees. Instead, the Court has recognized "that the government as employer has far broader powers than does the government as sovereign." Waters v. Churchill, 511 U.S. 661 (1994). Therefore, the Court has set a standard that strikes "a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568; Connick, 461 U.S. at 140; U.S. v. National Treasury Employees Union, 513 U.S. 454, 115 S.Ct. 1003 (1995).

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[2] McAuliffe v. Mayor of New Bedford, 115 Mass. 216, 220, 29 N.E. 517 (1892), "([A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.")

Those circuits that have specifically addressed the question of what test is to be applied to governmental employer restrictions on freedom of association have all agreed to the use of the Pickering balancing test. Boals v. Gray, 775 F.2d 686, 691-2 (6th Cir. 1985); Griffin v. Thomas, 929 F.2d 1210, 1213 (7th Cir. 1992); Hatcher v. Board of Public Education and Orphanage for Bibb County, 809 F.2d 1546, 1559 (11th Cir. 1987); Bodie v. City of Columbus, 989 F.2d 745, 749 (5th Cir. 1993).[3]

Moreover, the application of the Pickering balancing test to public employers' restrictions on their employees' associational rights is fully consistent with the underlying rationale behind both the cases establishing those rights and the Pickering balancing test. There is no express grant of a freedom of association in the United States Constitution. Instead, associational rights are derived from other First Amendment rights such as freedom of speech. Roberts v. U.S. Jaycees, 468 U.S. 609, 618, 622 (1984). Because in this case it appears that appellants' alleged associational interests derive from freedom of speech rights, it is appropriate to apply the Pickering line of cases which arise in freedom of speech settings. Moreover, the Pickering line of cases is premised on the different relationship between, on the one hand, the government and citizens it regulates as a sovereign and, on the other, the government and the individuals it

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[3] It should be noted that two of these courts have found that associational interests are only protected in the workplace where they relate to matters of public concern, Boals v. Gray, 775 F.2d at 623; Griffin v. Thomas, 929 F.2d at 1213, whereas the other two circuits found that any associational interests are entitled to First Amendment protection in the workplace. Hatcher v. Bd. of Education, 809 F.2d at 1558. Bodie v. City of Columbus, 989 F.2d at 749. Because, in this case, the New Jersey Supreme Court does not dispute that appellants' associational interests are related to matters of public concern, there is no need to address this split among the circuits. See Sanguigny v. Pittsburgh Bd. of Education, 968 F.2d 393, 400 (3d Cir. 1992).

employs. This difference is equally applicable to analysis of freedom of speech and freedom of association claims. Thus, in determining whether the New Jersey Supreme Court's prohibition on probation officer membership in law enforcement organizations is consistent with appellants' First Amendment rights, the district court and the Court of Appeals properly applied the Pickering balancing analysis.

In conducting the balancing test, the New Jersey Supreme Court's interest in maintaining the independence and impartiality, both in appearance and in fact, of the probation function of the judiciary is compelling. As the New Jersey Supreme Court stated in I/M/O Norma Randolph, 502 A.2d 533 (N.J. Sup. Ct. 1986), cert. den. 476 U.S. 1 (1986):

> We begin by emphasizing New Jersey's unique commitment to an independent judiciary. This concern for an independent judiciary is at the heart of the American legal system. One of the great advances made in the structure of government by our Federal Constitution was its provision for an independent judiciary whose judges could perform their duties as they saw fit without fear or favor ...
>
> "Especially in the administration of the criminal law -- the most awesome aspect of government -- society needs independent courts of justice. [Pennekamp v. Florida, 328 U.S. 331, 356, 66 S.Ct. 1029, 90 L.Ed. 1295, 1309 (1946) (Frankfurter, J., concurring).]" . . .
>
> What can we say of this ideal of judicial independence that has not been said? That "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." The Federalist No. 78 at 484 (A. Hamilton) (H. Lodge, Ed. 1888); that any lessening [of] the independence of the Judiciary [attacks] not only the judicial power,

> but the democratic republic itself," A. de Tocqueville, Democracy in America, 289 (Vintage Books 1945). [502 A.2d at 537-8].[4]

In New Jersey, the probation function has long been an arm of the judiciary, performing "services for the judiciary essential to the fair and efficient administration of justice." Passaic Co. Probation Officers' Assoc'n v. Co. of Passaic, 374 A.2d 449, 452 (N.J. Sup. Ct. 1977); See also Godfrey v. McGann, 179 A.2d 6 (N.J. Sup. Ct. 1962). In conducting the Pickering balancing test, the Supreme Court's interest in maintaining the impartiality of the probation arm of the judiciary, in fact and appearance, overwhelms probation officers' interests in belonging to police organizations. See United States Civil Service Commission v. Nat'l Assoc. of Letter Carriers, 413 U.S. 548, 565 (1973). As the New Jersey Supreme Court recognized, police officers, although vital public servants, are fundamentally aligned with one of the adversaries in the criminal justice system, the prosecution. (P. App. 91a). Accordingly, the New Jersey Supreme Court's policy prohibiting probation officer membership in police organizations is permissible even if, to some degree, it has an impact upon those employees' associational interests.

Petitioners place great alliance on this Court's decision in United States v. National Treasury Employees Union, supra, ("NTEU"). In that case, the Court found violative of the First Amendment a total ban on public employees' receipt of compensation for appearances, speeches or articles of any kind. Initially, it should be noted that, in NTEU, this Court clearly reaffirmed the application of the Pickering balancing

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[4] Since the New Jersey Supreme Court's decision in I/M/O Norma Randolph, supra, barring a court attendant from participation in certain civic organizations, the Court has modified the rules governing such activities. See Code of Conduct for Judiciary Employees, Canons 5 and 6; reprinted in Pressler, Rules Governing the Courts of the State of New Jersey, (1997 Ed.), pp. 416-426.

test to limitations on public employees' speech. 115 S.Ct. at 1012. The question in NTEU was what weight should be given to the federal government's interest in prohibiting the receipt of honoraria for a whole host of speech which was unrelated to public employment. As the district court found, after noting that NTEU involved a prohibition on speech which had no relationship to employees' official duties, the NTEU decision is clearly distinguishable from the instant case. (P. App.26a-28a).

The decision in NTEU is replete with references to the lack of a nexus between the speech limitation in that case and public employment:

> The content of respondents' messages has nothing to do with their jobs and does not even arguably have any adverse impact on the efficiency of the offices in which they work.
>
> They do not address audiences composed of co-workers or supervisors; instead they write or speak for segments of the general public. Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audience they address has any relevance to their employment . . . .
>
> Because the vast majority of the speech at issue in this case does not involve the subject matter of government employment and takes place outside the workplace, the government is unable to justify section 501(b) on the grounds of immediate workplace disruption asserted in Pickering and the cases that followed it.

115 S.Ct. at 1012, 1015. The Court's decision in NTEU is similarly replete with references to the extraordinary breath of

the speech limitation in that case. By contrast, in this case 1) there is a clear nexus between the work of probation officers and the limitation on law enforcement associations and 2) the limitation is narrowly focused to address the judiciary's concern with maintaining impartiality.

Thus, petitioners' reliance on this Court's statements that the government has a greater burden in the weighing analysis where it imposes a "wholesale deterrent to a broad category of expression by a massive number of potential speakers" than in the case of isolated disciplinary action, NTEU, 115 S.Ct. at 1014, is misplaced. This case falls somewhere between the two extremes of a wholesale deterrent to a broad category of expression and a single disciplinary action, although it is much closer to the latter. The New Jersey Supreme Court's policy pronouncement, which was occasioned by a widespread movement of probation officers to affiliation with police organizations, was directed at a particular category of employees and a specific form of association.

Petitioners also point to the Court's statement, in NTEU, dismissing a government argument that it could not have included a nexus limitation to the ban on honoraria because such a limitation would be administratively difficult to enforce. Again, the situation here is clearly distinguishable. In NTEU, a case-by-case review of the receipt of honoraria for federal employees would be feasible, but inconvenient, in order to determine whether individual instances of compensation would create an appearance of impropriety or create a very real conflict of interest. In contrast, in the instant case, the prohibition on probation officer membership in police organizations is relevant to each and every probation officer, thus making any individual review unnecessary. Moreover, with respect to the concern with the impact of such membership on the actual functioning of probation, the New Jersey Supreme Court determined that the monitoring of individual probation officers to determine such an effect was not just inconvenient, it was "almost impossible" (P. App.

95a, 117a). Thus, unlike the defendant in NTEU, the New Jersey Supreme Court is not relying on mere administrative convenience to support its position.

Petitioners also ignore the fact that, in NTEU, the Supreme Court found numerous anomalies in the provision for the honoraria ban, casting "serious doubt" on the government's purported rationale for the ban. 115 S.Ct. at 1017-1018. Finally, petitioners rely on this Court's citation to Turner Broadcasting System, 512 U.S. 622, 114 S.Ct. 2445, 2470 (1994) to the effect that the government must demonstrate that the recited harms are "real, not merely conjectural." NTEU, 115 S.Ct. at 1017. However, appellants fail to explain how the New Jersey Supreme Court's concern with the appearance of impartiality of the Judiciary is not real. Moreover, petitioners ignore the federal courts' continued obligation to defer to considered "judgments about issues such as appearance of impropriety." NTEU, 115 S.Ct. at 1018.

In Waters v. Churchill, supra, this Court recognized that, in the public employment setting, it must defer to reasonable predictions of government employers.

> We have consistently given greater deference to government predictions of harm used to justify restrictions of employees speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative. One could make a respectable argument that political activity by government employees is generally not harmful, [although the Court has allowed public employer restrictions on such speech by public employees] see Public Workers v. Mitchell, supra, 330 U.S. at 99; [114 S.Ct. at 1887].

In sum, NTEU is distinguishable from the instant case because it involved 1) a broad-based ban on a wide array of speech by all government employees, 2) a ban on speech with no nexus to public employment, and 3) numerous anomalies which called into question the rationale which supported the governmental interest in the Pickering balancing analysis. While the result in NTEU is distinguishable, it is significant that the case continues to apply the Pickering balancing analysis to governmental policies limiting public employees' speech and confirms the significance of whether such employee activity has a nexus to the public employment.

B.

PANJ'S TWO DUE PROCESS CLAIMS WERE EITHER NOT RAISED BELOW AND/OR CLEARLY LACK MERIT.

Petitioner Probation Association of New Jersey raises two due process claims. First, petitioner argues that the New Jersey state constitutional right of public employees to present grievances "through representatives of their own choosing," N.J. Const. (1947) Art. I, ¶19, and the New Jersey Employer-Employee Relations Act, N.J. Stat. Ann. 34:13A-5.3, created a liberty interest in probation officers' membership in police organizations. While petitioner PANJ did assert, in the district court, state law claims based on the state constitution and the New Jersey Employer-Employee Relations Act, neither its complaint nor its briefs to the district court asserted that these state law rights created a liberty interest triggering due process rights. (P. App. 18a-19a, 35a). For that reason, the issue was not addressed in the district court opinion. It was raised for the first time in the Third Circuit, but that court did not address the issue. Because the issue was not raised in the trial court, it should not be considered on appeal. Singleton v. Wulff, 428 U.S. 106, 120 (1976).

Moreover, it is well established that the rights afforded to public employees under the New Jersey Constitution are more limited in character than those available to employees in the private sector and do not extend to every public employment relationship. Communication Workers of America v. Union Co. Welfare Bd., 315 A.2d 709, 715 (N.J. App. Div. 1977). Petitioners are unable to cite any authority for the position that the relevant state constitutional or statutory provisions create any liberty interests.

PANJ also alleges that the New Jersey Supreme Court's decision effects a taking of property without due process of law. The linchpin of this argument is the assertion that the policy threatens a termination of their jobs. However, the policy merely requires that probation officers resign any affiliations with police organizations. Only if they violate the policy would they be subject to discipline, including loss of employment.

Clearly, the mere establishment of a policy, which if violated could result in discipline or termination, does not constitute the taking of property. Indeed, petitioners did not allege, as they could not, that if any probation officers are terminated for violation of the policy that they would not be given a hearing on that action. As the district court found, it is the termination of employment which must be attended by due process, not the announcement of a policy (P. App. 35a-36a). Petitioner totally fails to address this clearly meritorious determination.

C.

THE DISTRICT COURT PROPERLY DECLINED TO EXERCISE SUPPLEMENTAL JURISDICTION OVER PETITIONERS' STATE LAW CLAIMS.

Petitioner PANJ suggests that this matter involves "extraordinary circumstances" justifying the retention of federal jurisdiction over purely state law claims, even if all federal claims are dismissed. Cito v. Bridgewater Tp. Police Dept., 892 F.2d. 23, 26 (3d Cir. 1989). The state law claims involve alleged violations of probation officers' constitutional right to a union representative of their own choosing and a violation of the New Jersey Employer-Employee Relations Act. Before addressing the discretionary authority of federal courts to exercise jurisdiction over state law claims, 28 U.S.C. §1367, it must be recognized that in this case the state law claims have been brought against the Justices of the New Jersey Supreme Court, in their official capacity. Therefore, the Eleventh Amendment of the United States Constitution, which immunizes the states from federal jurisdiction over state law claims, bars federal jurisdiction over the New Jersey law claims in this case. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 101 (1984).[5]

Moreover, even if the district court had discretion to retain jurisdiction over the supplemental claims here, it clearly did not abuse its discretion in declining to do so. All the federal claims were dismissed before the filing of an answer. No substantial investment of time by the parties or the court had taken place in the issues raised in the state law claims.

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[5] Because the district court saw no reason to exercise its discretion to retain jurisdiction, it did not reach the Eleventh Amendment argument.

Moreover, 28 U.S.C. §1367(c)(1) specifically provides that one reason for declining supplemental jurisdiction is that the claims raise novel or complex issues of state law. The regulatory scheme governing collective negotiating rights of New Jersey public employees, particularly of the State's judiciary, are especially complex.

The New Jersey Supreme Court has squarely held that the provisions of the New Jersey Employer-Employee Relations Act are not legally binding on the judiciary. Passaic County Probation Officer Ass'n v. County of Passaic, supra; I/M/O Judges of Passaic Co., 495 A.2d 848 (N.J. Sup. Ct. 1985). Although, as a matter of comity, the Court has often looked to the Public Employment Relations Commission and its expertise in addressing public employment relations issues as they apply to the judiciary, the New Jersey Supreme Court is free to apply its own judgment to the special needs of the judiciary. In addition, as stated earlier, the rights of public employees in New Jersey are unique and different than those granted to private employees. N.J. Const. (1947), Art. I, ¶19; Passaic Co. Probation Officers Ass'n v. Co. of Passaic, supra.

Citing no authority, petitioners also assert that because the New Jersey Supreme Court is the court of last resort for state law claims in New Jersey, the district court should have exercised supplemental jurisdiction, despite the early dismissal of all federal claims. If accepted, petitioners' argument would turn the federal courts into the tribunals to hear state law claims against the highest court of each state, merely by the use of the device of appending to the claim a meritless federal claim. The New Jersey Supreme Court has in the past reviewed its policies and determined, on constitutional grounds, to modify them or not to apply them to certain circumstances. See In re Gaulkin, 69 N.J. 185 (N.J Sup. Ct. 1976). And the United States Court of Appeals for the Third Circuit has entrusted the New Jersey Supreme Court to do so. See Hughes v. Lipscher, 906 F.2d 964, 967 (3d Cir. 1990).

("The federal courts owe deference to their state counterparts in situations where public perceptions of the integrity of the State judicial system are affected.") Plaintiffs' suggestion that the district court abused its discretion by failing to exercise supplemental jurisdiction over state law claims in this case, and that the Court of Appeals erred in affirming the judgment on that basis, is contrary to established law and principles of comity.

CONCLUSION

For all the reasons stated herein, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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